SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 860

HOWARD BRETT LEVY,

Petitioner,

—v.—

STANLEY R. RESOR, Secretary of the Army; GINES PEREZ, Major General, Commanding General, Fort Jackson, South Carolina; E. B. ROBERTS, Brigadier-General, Acting Commander, Fort Jackson, South Carolina; JODE WILSON, Lt. Colonel, Provost Marshal, Fort Jackson, South Carolina; and CHARLES JACKSON, Second Lieutenant, Confinement Officer, Fort Jackson, South Carolina,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Howard Brett Levy prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on October 27, 1967.

Citations to Opinions Below

The opinion and order of the United States Court of Appeals for the Fourth Circuit, as yet unreported, are reproduced in full and attached hereto as Appendix "A". The opinion of the United States District Court for the Eastern District of South Carolina is unreported and a copy thereof is attached hereto as Appendix "B". The opinion of the United States Court of Military Appeals in *Levy* v. *Resor* is reported at 17 U. S. C. M. A. 135, 37 C. M. R. 399, and a copy thereof is attached hereto as Appendix "C".

Copies of the opinions in related and unreported cases, *Levy* v. *McNamara* (D. D. C. 1967) and *Levy* v. *Corcoran* (D. C. Cir. 1967), are attached hereto as Appendices "D" and "E" respectively. Certiorari was denied in *Levy* v. *Corcoran,* No. 576, on November 13, 1967. 36 LW 3204.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 27, 1967. The jurisdiction of this court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Whether petitioner whose military obligation expired on July 8, 1967, and who is subject to military authority for the sole purpose of serving a sentence imposed by court-martial may be held in custody pending appeal when the decision to do so was made without any hearing, was based

on allegedly subversive pre-service political associations and information related thereto and an alleged intention to flee based thereon and on information gleaned from a confidential informant who admittedly relied on hearsay statements made by a second confidential informant in contravention of the First Amendment, the Due Process Clause of the Fifth Amendment, the Confrontation Clause of the Sixth Amendment, and the Eighth Amendment.

2. Whether the First Amendment requires release of petitioner pending appeal of his conviction by court-martial and his appeal of the ruling of the District Court denying relief.

3. Whether, when the denial of bail or other form of release to a person pending appeal of a conviction by court-martial may have "a chilling effect on free expression", and substantial questions regarding the application of First Amendment freedoms are raised in that appeal which is neither frivolous nor for the purpose of delay, such confinement is forbidden by the First, Fifth and Eighth Amendments.

4. Whether the Due Process Clause of the Fifth Amendment includes the right to an intra-military or civil or any hearing on the request of a military prisoner for release on bail or otherwise pending appeal of a conviction by court-martial.

5. Whether the order of confinement of petitioner pending appeal is reviewable by the civilian courts, and if reviewable, whether the government abused its discretion under the circumstances of this case.

6. Whether the "special circumstances" and "substantial questions" existing here require the admission of petitioner to bail pending appeal in this court.

7. Whether in the event petitioner is not released pending appeal and is transferred from Fort Jackson, South Carolina to Fort Leavenworth, Kansas such transfer will (a) deprive him of the right to adequate counsel on appeal in violation of the Sixth Amendment of the Constitution of the United States, and (b) substantially alter the facts upon which he was denied bail in the courts below in violation of the Due Process Clause of the Fifth Amendment, and (c) cause him to serve his sentence in full in the most onerous of conditions while his appeal is pending, in violation of the Due Process Clause of the Fifth Amendment and the Cruel and Unusual Punishments Clause of the Eighth Amendment.

Constitutional and Statutory Provisions Involved

The constitutional provisions which this case involves are the First, Fifth, Sixth, and Eighth Amendments of the Constitution of the United States.

The regulation which this case involves is paragraph 21(d) Manual for Courts-Martial which provides:

> "Responsibility for restraint after trial. Upon notification from a trial counsel of the result of a trial 44e(2), a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. Such action, depending on the circumstances, may involve the immediate release of the person from any restraint, or the imposition of any necessary restraint pending final action on the case."

Related statutes, the constitutionality of which is not under attack in this proceeding, but which are attacked either facially or in their application in military appellate proceedings are:

(1) 50 U. S. C. §890 which reads as follows:

> §890. Assaulting or willfully disobeying officer. Any person subject to this code who— . . . (2) willfully disobeys a lawful command of his superior officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time by such punishment, other than death, as a court-martial may direct.

(2) 50 U. S. C. §933 which reads as follows:

> §933. Conduct unbecoming an officer and gentleman. Any officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and gentleman shall be punished as a court-martial may direct.

(3) 50 U. S. C. §934 which reads as follows:

> §934. General Section. Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

Statement

Following his conviction by general court-martial, and after the denial to him of commandant's parole (para. 21 (d) Manual for Courts-Martial) (MCM) or other release pending appeal, and after the denial of his request for release by the Secretary of the Army, petitioner totally exhausted his intra-military remedies. On June 20, 1967, he sought relief by way of habeas corpus or alternatively bail pending appeal, mandamus or other appropriate relief from both the United States Court of Military Appeals and the United States District Court for the Eastern District of South Carolina (Columbia Division). On June 23, 1967, the District Court issued an order for rule to show cause. On June 26, 1967, the Court of Military Appeals heard arguments and on July 7, 1967, denied relief. On June 28, 1967, the respondents in the District Court filed their return, answer and memorandum including an affidavit (identical with one filed in the Court of Military Appeals) which alleged that among the "most serious" reasons for denying release was a risk of flight based upon the following "considered as particularly crucial":

> (a) Information received on or about 31 May, 1967, from a confidential source who has furnished reliable information in the past, that Captain Levy had expressed the following to a close associate: his intention upon conviction to seek bail, and, having been released thereon, to flee the United States to a communist country, seek political asylum therein, remain absent from the United States for a period of several years, during which time he would denounce the United States, and that after several years he would contact

an American embassy in the communist country and request permission to return to the United States; and that he fully expected this request would be granted in view of the lenient treatment of defectors by the United States.

(b) A statement by Captain Levy, appearing in the Article 32 investigation, that he had been involved in the activities of the Militant Labor Forum (MLF), and that he knew the MLF was related to the Socialist Workers Party, an organization listed for consideration in accordance with Executive Order 10450 (R. Vol. I, p. 87).

On July 6, 1967, with no evidentiary or other hearing, the District Court denied relief and dismissed the petition. On July 10, 1967 the petitioner moved for: (1) reconsideration, denied each of the averments of the affidavit, alleged bad faith on the part of the affiant and sought an evidentiary hearing; and (2) bail pending appeal to the United States Court of Appeals for the Fourth Circuit. The District Court then denied the motion for reconsideration and the application for bail pending appeal and notice of appeal was filed. Although the United States Court of Military Appeals in deciding against petitioner relied upon the then existing circumstances of his confinement,[1] repre-

[1] See *Levy* v. *Resor, supra,* at 140-141 (R. Vol. III, pp. 46-47) where the Court said: "In the case at bar the petitioner was placed not in a military stockade, with other convicted prisoners, but in a hospital room on the base, albeit under guard. In its brief, counsel alleged that the petitioner was subjected to harrassment [sic] by the light in his room being on constantly and by the fact that his guard followed him whenever he left the room to use the toilet facilities. We were told at the time of oral argument, however, that these indignities have now been removed.

(footnote continued on following page)

sentations concerning the nature of that confinement having been made there and in the District Court by the government,[2] a motion to transfer petitioner was filed on September 1, 1967. On September 11, 1967, petitioner sought bail pending appeal of the order dismissing the habeas petition and filed a memorandum and affidavits in opposition to the motion to transfer (R. Vol. III, pp. 44-69).

On October 27, 1967 the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court, denied petitioner's motion for bail and granted respondent's motion for transfer.

Petitioner, a Captain in the United States Army, and a physician, entered active duty on July 9, 1965 for a period of two years. During the year 1966 he engaged in private

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Under the facts of this case *and in light of the circumstances of the petitioner's present confinement,* we do not find an abuse of discretion on the part of the commanding officer in refusing to release the petitioner from confinement under paragraph 21*d, supra.*" [Emphasis supplied.]

[2] See Brief of the Government, Affidavit, p. 3 (R. Vol. III, pp. 47-48), stating:

"The conditions of the accused's temporary custody, also described generally in my letter of 12 June, 1967 (Petitioner's Exhibit J) are constantly under review and have been modified on several occasions to a considerably less rigorous restraint. They are not more rigorous than the circumstances required to insure his presence and well being. The physical facilities are depicted in the photographs attached hereto. (These photographs are found in the Record at page 90.) Presently, only one guard is assigned to watch over the petitioner. The petitioner is allowed to regulate his own hours of sleep, may supplement his meals, and control the lighting in his room. He has a telephone in his room on which to receive incoming calls, is also allowed private access to his counsel and other visitors, is accorded unrestricted visiting privileges, and all mail received for him is delivered to him unopened."

See also letter from counsel for petitioner to government counsel, which stated: "This will confirm our conversation of Friday, July 14, 1967, to the effect that the custody of Captain Levy would not be disturbed pending appeal" (R. Vol. III, p. 49).

and informal discussions with Army personnel, enlisted men and officers, expressing disagreement with American foreign policy in general and Vietnamese policy in particular. He critically discussed what he believed to be national policy regarding the rights of Negro citizens. He made no public speeches, carried no picket signs, and participated in no demonstrations, in or out of uniform.

Based solely upon such conversations, petitioner was convicted by a general court-martial of violations of Articles 133 ("conduct unbecoming an officer and gentleman") and 134 ("the general article") UCMJ, 50 U. S. C. §§933, 934.[3] Based upon his refusal to train Special Forces personnel in the use of medicine he was convicted of the violation of Article 90 UCMJ, 50 U. S. C. §890.[4] He was sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement for three years at hard labor.

Petitioner's conviction is presently being reviewed by the United States Army Board of Review, Washington, D. C.[5]

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[3] Two additional charges under Articles 133 and 134 UCMJ based on a single letter written by petitioner to a member of the armed forces in Vietnam were reduced by the court-martial and dismissed by the law officer prior to sentencing.

[4] At trial, petitioner contended the order was unlawful and in contravention of the First, Fifth, Sixth, and Ninth Amendments, it being given solely for the purpose of punishing him for pre-service political associations, expressions of political views and matter contained in a 180-page G-2 dossier, only 80 pages of which his civilian counsel was permitted to see. He additionally contended that the order contravened standards of ethical medicine and was in violation of constitutionally protected standards of ethical medicine and, further, was in violation of treaty obligations as expressed in the Army's Law of Land Warfare, Field Manual 27-10.

[5] Counsel was notified on August 24, 1967, that the record had been received and referred to the Board of Review, and that enu-

From the date of his entry into military service until his sentencing on June 3, 1967, petitioner resided off post and remained free of all restraint.

The intra-military appeal of petitioner's court-martial conviction involves, among others, important First and Fifth Amendment problems relating to the facial unconstitutionality of Articles 133 and 134 UCMJ and the unconstitutional application of Articles 90, 133 and 134 UCMJ.

The basis for federal jurisdiction in the District Court was Article 1, Section 9, Clause 2 of the Constitution of the United States, and 28 U. S. C. §2241.

Reasons for Granting the Writ

This case does not involve: the legality or the constitutionality of the Viet Nam conflict, questions of the applicability of decisions of the Nuremberg tribunal or the commission of war crimes whether as defined by the Army's Law of Land Warfare, Field Manual 27-10, or otherwise, rights of conscientious objectors to all or particular wars, garden-variety military duty assignments or intra-military affairs.[6]

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meration of errors and brief were to be filed therein by September 12, 1967. Due to the voluminous nature of the record (18 volumes and more than 4,000 pages), petitioner was forced to seek an extension of time and must now file his enumeration of errors and brief therein by January 6, 1968.

[6] Although numerous questions like those in *Mora* v. *McNamara*, No. 401, *cert. den.*, November 6, 1967, 36 LW 3189 and *Mitchell* v. *United States*, No. 1012, *cert. den.*, March 20, 1967, 35 LW 3330, were raised at the Levy court-martial and will be pressed in the military appeal, assuming that the expiration of petitioner's sentence does not moot that appeal, they are not involved here.

Nor does this case, in itself, contest the facial or applicatory invalidity of Articles 90, 133 and 134 UCMJ under the First and Fifth Amendments.[7]

Nor is this a case where the petitioner would be subject to any military authority were it not for the attachment of court-martial jurisdiction and the service of the sentence imposed thereby. He has been ordered to jail. The Army has no authority to issue orders to him not connected with his court-martial conviction for the very simple reason that his term of duty has expired.

This case does involve important questions of federal law which have not been, but should be, decided. This case does involve the extent to which the guaranties of the Bill of Rights apply to American citizens who enter the armed forces under the Doctors Draft Law, 50 U. S. C. App'x Sec. 454 (a) or under other provisions of selective service laws.

It does involve the service of a sentence at hard labor while a substantial, non-frivolous, non-delay appeal is pending. And this (service of a sentence at hard labor) is based upon pre-service political associations, cf. *Harmon* v. *Brucker*, 355 U. S. 579 (1958), plus a purported intention to flee based upon fourth-hand hearsay from an unnamed "confidential source," a "close associate," and "observers." And this intention to flee was ascertained with no due process hearing in either military or civil courts. Cf. *McCray* v. *Illinois*, 386 U. S. 300 (1967).[7a] In

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[7] Certiorari was denied in *Levy* v. *Corcoran*, No. 576, November 13, 1967, 36 LW 3204. Questions there involved were also raised at the Levy court-martial and will be pressed in the military appeal, assuming that the expiration of petitioner's sentence does not moot that appeal.

[7a] See also *Whelchel* v. *McDonald*, 340 U. S. 122 (1950) and *Guzick* v. *Schilder*, 340 U. S. 128 (1950).

McCray there was but one informer and the person to whom the information was given was subjected to cross-examination. Here, unlike *McCray,* there has been no "evidence," no "open court," no "cross-examination," no test of "credible," no test of "reliable," no "magistrate" to "doubt the credibility," no "precise detail," no "reason" why, *no hearing at all.* A military official has simply relied on the worst kind of information in depriving a prisoner of his right to release whether under para. 21 (d) MCM or otherwise. In short, he has been denied bail or other relief in a manner resembling but perhaps providing fewer Fifth and Sixth Amendment rights than the Star Chamber.

As importantly, First Amendment rights are said to be preferred rights. *Marsh* v. *Alabama,* 326 U. S. 501, 509 (1946); *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949); *Bond* v. *Floyd,* 385 U. S. 116 (1966); *Stromberg* v. *California,* 823 U. S. 359, 367 (1931); *Smith* v. *California,* 361 U. S. 147, 169 (1959); *Saia* v. *New York,* 334 U. S. 558, 562 (1948); *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). This court has not hesitated to strike down statutes overbroad in the area of the First Amendment which create a "chilling effect upon the exercise of First Amendment rights." *Dombrowski* v. *Pfister,* 380 U. S. 479, 487 (1965). See also *NAACP* v. *Button,* 371 U. S. 415, 432-433 (1963); *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Baggett* v. *Bullitt,* 377 U. S. 360, 378-379 (1964); and *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967). The *Dombrowski* line of cases was authored to protect the valuable rights of free expression and dissent. The heart of *Dombrowski* is that a defendant is not required to submit to unconstitutional prosecution affecting First Amendment rights upon the theory that ultimate

vindication of constitutional rights can never be achieved in such circumstance:

> "For '[t]he threat of sanctions may deter . . . *almost as potently as the actual applications of sanctions* . . .'" [citations omitted]. [Emphasis supplied.] 380 U. S. at 486.

In *Dombrowski* criminal proceedings were threatened. Here they have been concluded. In *Dombrowski* it was the threat which was enjoined. Here the petitioner is actually incarcerated and that incarceration is absent a due process hearing and on the face of the record the direct result of political associations, expressions and fourth-hand information from a confidential informant. The very least *Dombrowski* requires is release of the petitioner pending appeal.[8] For as long as he remains incarcerated, jailed at hard labor, he stands as a symbol of repression, a warning to all that despite the First Amendment, dissent from our national policy is not tolerated; the military process may be utilized to quiet those who disagree. The importance of petitioner's case to the millions of Americans in the Armed Forces and the countless millions more who may enter them is evident. As the Supreme Court has made clear, in our constitutional system the government is re-

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[8] Release pending appeal in cases involving substantial First Amendment questions seems a matter of right. *In re Shuttlesworth*, 369 U. S. 35 (1962); *Dresner* v. *Stoutamire*, No. 21802 (5th Cir August 5, 1964); *Smith* v. *Davis*, No. 24649 (5th Cir. April 12, 1967). And the negative implication of *Aronson* v. *May*, 85 S. Ct. 3 (1964) and *Yanish* v. *Barber*, 73 S. Ct. 1105 (Douglas, Circuit Justice, 1953) is that bail pending appeal should be allowed whenever there are substantial questions presented. See also *Harvey* v. *Mississippi*, 340 F. 2d 263 (5th Cir. 1965) (unreported order of November 10, 1964, 5th Cir. No. 22005), *Curtis* v. *Boeger*, 331 F. 2d 675 (8th Cir. 1964), and *Leigh* v. *United States*, 82 S. Ct. 994, 996 (1962).

quired to accept the "danger" inherent in free expression even in time of war.

> "[E]ven the all embracing power and duty of self preservation is not absolute. Like the war power, which is indeed an aspect of the power of self preservation, it is subject to applicable constitutional limitations. See *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146. Our Constitution has no provision lifting restrictions upon government authority during periods of emergency, although the scope of a restriction may depend upon the circumstances in which it is invoked.
>
> The First Amendment is such a restriction. It exacts obedience even during periods of war; it is applicable when war clouds are not figments of the imagination no less than when they are." *Dennis* v. *United States*, 341 U. S. 494, 520 (1951) (concurring opinion). See also *Reid* v. *Covert*, 354 U. S. 1, 14 (1957).[9]

When the Supreme Court has ruled against claimed First Amendment rights, it has been only after exhaustive examination of the facts and circumstances. As Mr. Chief Justice Warren has said, the military necessity must be "striking," not simply present to warrant invasion of constitutional rights.[10] In the instant case one can only speculate as to the governmental interest (save silencing the petitioner and others who think like him) served by petitioner's confinement.[10a]

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[9] Cf. *New York Times* v. *Sullivan*, 376 U. S. 254 (1964) and *Garrison* v. *Louisiana*, 379 U. S. 64 (1964).

[10] Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181 (1962).

[10a] Cf. *Overseas Media Corporation, et al.* v. *Robert S. McNamara*, No. 20590, D. C. Cir., October 3, 1967, slip opinion, n. 12, 12-14.

Furthermore it seems clear that the concept of Due Process of Law under the Fifth Amendment is at least as broad as that Fourteenth Amendment Due Process. Indeed it has been said that the Due Process Clause of the Fourteenth Amendment " . . . operates to extend . . . the same protection against arbitrary state legislation, affecting life, liberty and property, as is afforded by the Fifth Amendment." *Hibben* v. *Smith,* 191 U. S. 310, 325 (1903). See also *Carroll* v. *Greenwich Insurance Co.,* 199 U. S. 401, 410 (1905), and *French* v. *Barber Asphalt Paving Co.,* 181 U. S. 324, 328 (1901). In addition, it is no longer open to argument but that the basic guarantees of the Due Process Clause of the Fifth Amendment apply to intra military proceedings. *United States ex rel. Innes* v. *Hiatt,* 141 F. 2d 664, 666 (3rd Cir. 1944); *Burns* v. *Lovett,* 202 F. 2d 335, 339 (D. C. Cir. 1952), aff'd *sub nom. Burns* v. *Wilson,* 346 U. S. 137 (1953); *United States* v. *Tempia,* 16 U. S. C. M. A. 625, 37 C. M. R. 249 (1967); *Shapiro* v. *United States,* 69 F. Supp. 205, 207 (Ct. Cl. 1947).

The applicability of the Eighth Amendment to the military seems equally clear. In *Robinson* v. *California,* 370 U. S. 660 (1962), the Cruel and Unusual Punishments Clause was applied to the states. A similar assumption with respect to the Excessive Fines Clause was made in *United States* v. *Knoss,* 239 F. Supp. 118, 119 n. 3 (S. D. N. Y. 1965), *aff'd,* 345 F. 2d 533 (2d Cir. 1965) and the Bail Clause was applied in *Pilkington* v. *Circuit Court,* 324 F. 2d 45, 46 (8th Cir. 1963).

It is inconceivable that the Framers intended that the Eighth Amendment should apply to the states but not to the military arm of the federal government. But, unless para. 21 (d) MCM provides for bail there is no statutory or other provision for military bail. Indeed, the Bail Re-

form Act (18 U. S. C. Sec. 3152 (2)) excludes offenses "triable by court-martial." Henderson[11] commented that "bail . . . is inappropriate in the military where the individual has no freedom of movement but is at all times subject to control by his superiors." But here petitioner is at no time "subject to control by his superiors" except for the jurisdiction of the court-martial and the service of his sentence. Thus the reason for Henderson's rule (if it were a rule) falls.

It has been said that appeal itself is not a constitutional right: *Griffin* v. *Illinois,* 351 U. S. 12, 18 (1956). For all practical purposes appeal did not exist at the time of adoption of the Eighth Amendment. But, once appeal rights have been granted they must be equally applied to all. *Griffin* v. *Illinois, supra.* And, as Professor Foote[12] has said:

> The Appeal problem [bail pending appeal] as a right guaranteed by the Eighth Amendment is simpler and the proper answer to me seems self-evident. The question did not arise when the rights involved in the Eighth Amendment were being forged simply because the criminal appeal can be regarded almost [as] a modern innovation which was "very largely a product of the nineteenth century. [Citing Allen, *Griffin* v. *Illinois, Antecedents and Aftermath,* 25 U. Chi. L. Rev. 151, 154

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[11] Henderson, *Courts-Martial and the Constitution: The Original Understanding,* 71 Harv. L. Rev. 293, 316, n. 309 (1957). Cf. Wiener, *Courts-Martial and the Bill of Rights; the Original Practice,* 72 Harv. L. Rev. 1, 286. See also Note: *Servicemen in Civilian Courts,* 76 Yale L. J. 380, 398 (1966).

[12] Foote, *The Coming Constitutional Crisis in Bail:* II, 113 U. Pa. L. Rev. 1125, 1182-1183 (1965). For the most complete historical analysis of the right to bail and the Eighth Amendment, see Foote, *The Coming Constitutional Crisis in Bail:* I, 113 U. Pa. L. Rev. 959, 965-989 (1965).

(1957).] As appeal has now become an integral part of the judicial process in criminal cases, the same constitutional protection should be applied pending appellate disposition as prior to conviction, a result dictated not only by the logic of the Eighth Amendment, but also by unsatisfactory experience with discretionary power to deny bail pending appeal.

Other Fifth, Sixth and Eighth Amendment questions arise from the government's current desire to transfer petitioner from Fort Jackson, South Carolina to Fort Leavenworth, Kansas. Such transfer would (a) deprive him of the right to adequate counsel on appeal in violation of the Sixth Amendment of the Constitution of the United States, and (b) substantially alter the facts upon which he was denied bail in violation of the Due Process Clause of the Fifth Amendment. Additionally he will serve at hard labor a sentence for crimes which may be non-existent.[13]

Petitioner's transfer is not sanctioned by the rules of this Court. Rule 49 (1) provides that pending review of a decision refusing a writ of habeas corpus " . . . . the custody of the prisoner shall not be disturbed, except by order of the court wherein the case is then pending, or of a judge or justice thereof, upon showing that *custodial considerations* require his removal" [emphasis supplied].[14] The "cus-

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[13] For *"even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."* [Emphasis supplied.] *Robinson* v. *California, supra,* at 667. And, that "one day in prison" would be even more cruel if exacted for the commission of no crime at all.

[14] While the rules of the Supreme Court have been recently revised the altered wording of the rule regarding grounds for seeking transfer seems not substantively changed. In any case the matter here at issue is governed by existing rule 49 (1). Journal of Proceedings on June 12, 1967, 35 LW 3438.

todial considerations" upon which a transfer may be based as contemplated by Rule 49 (1) ". . . are illness or intractable behavior on the part of the prisoner, requiring his removal for medical treatment or for closer confinement." Stern and Gressman, *Supreme Court Practice,* 3rd Ed., 1962, p. 414. The Army does not aver that Captain Levy's behavior in confinement has been intractable nor is he ill. Captain Levy is sole prisoner in a hospital room, the confinement being as close as possible to the very facility to which he would be transferred for medical treatment if ill.

It is a settled constitutional doctrine that prisoners have a right of "reasonable access to the courts,"[15] including the right of effective counsel pursuant to the Sixth Amendment as well as the rights to due process and equal protection on appeal.[16] The thrust of these principles of constitutional law seems merged in *United States* v. *Warden, United States Pen., Leavenworth, Kansas,* 216 F. Supp. 609 (D. Kans. 1963). There the prisoner had been convicted and sentenced in the Southern District of New York. Pending his appeal he was transferred from New York to Leavenworth, Kansas. The prisoner then filed a petition for writ of habeas corpus claiming that confinement some

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[15] *Hatfield* v. *Bailleaux,* 290 F. 2d 632, 636 (9th Cir. 1961) dictum; *Ex parte Hull,* 312 U. S. 546 (1941); *White* v. *Regen,* 324 U. S. 760, 762, n. 1 (1945) and cases cited; *Dowd* v. *United States,* 340 U. S. 206 (1951); *Smith* v. *Bennett,* 365 U. S. 708 (1961); *Patton* v. *North Carolina,* 381 F. 2d 636 (4th Cir. 1967).

[16] See e.g., *Douglas* v. *California,* 372 U. S. 353 (1963); *Griffin* v. *Illinois,* 351 U. S. 12 (1956); *Eskridge* v. *Washington Prison Board,* 357 U. S. 214 (1958); *Lane* v. *Brown,* 372 U. S. 477 (1963); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Harvey* v. *Mississippi,* 340 F. 2d 263 (5th Cir. 1965); and *United States* v. *McMahan,* 6 U. S. C. M. A. 709, 717, 21 C. M. R. 31 (1955).

fifteen hundred miles from New York operated to deny him the assistance of counsel on appeal in violation of the Sixth Amendment. Even though the appeal had been lodged in the Court of Appeals and the appellate brief filed, the court nonetheless ordered petitioner returned to New York stating that the appeal was still pending and the petitioner was "'. . . entitled to 'the guiding hand of counsel at every step in the proceeding' *Powell* v. *Alabama*, 287 U. S. 45, 60 (1932)." 216 F. Supp. at 611. The District Court stated:

> "Interference with the confidential relationship between an attorney and his client makes the assistance of the attorney ineffective. In this case, opportunity for personal consultation has been removed, or at least seriously hampered, by the transfer of the petitioner from New York to Leavenworth." 216 F. Supp. at 611.

United States v. *Warden, United States Pen., Leavenworth, Kansas, supra,* has been followed. In *Levine* v. *Willingham,* 261 F. Supp. 743, 746 (D. Kans. 1966) the court again stated that the prisoner has a right under the Sixth Amendment to the effective assistance of counsel. In *Levine* the court allowed transfer while appeal was pending but only after pointing out that the prisoner ". . . had remained near his place of trial for a period reasonably necessary to permit him to assist his counsel in preparation for his appeal . . ." 261 F. Supp. at 746.[17] Counsel represents

[17] *United States* v. *Warden, United States Pen., Leavenworth, Kansas, supra,* was governed by old Rule 38 (a)(2) F. R. Crim. P. which provided for an election whether or not to commence service of sentence when bail was denied. In *Levine* v. *Willingham, supra,* revised Rule 38 was applicable; however, the court in the latter case rejected any possible Rule 38 construction as grounds for its decision basing its ruling rather on the Sixth Amendment right to counsel. *Ibid.*, p. 746.

that such a condition has not been met in the instant case. There, only one appeal was involved and that on the substantive issue of the case, and the prisoner had remained near the place of trial for approximately 24 months.[18]

Transfer to Fort Leavenworth would additionally substantially alter the facts upon which this case was decided by military and civilian courts in denying petitioner bail. Indeed, the government seems to seek a change not merely in the rules of the game, but perhaps more importantly, to move the stadium itself.

Petitioner contends that he has been denied release pending appeal for his pre-service political associations and his political views. Administrative action otherwise taken on the basis of non-service activities may not constitutionally form the basis for actions presumably taken upon service activities. *Harmon* v. *Brucker, supra,* 580, and *Orloff* v. *Willoughby,* 345 U. S. 83, 96-97 (1953), dissenting opinion of Black, *J.* joined by Frankfurter, *J.* and Douglas, *J.* The importance of not penalizing a man for his political views (the essence of the criminal charges against Dr. Levy and the affidavit of the government) was explained by Mr. Justice Douglas who quoted from *Williamson* v. *United States,* 184 F. 2d 280, 283 (2d Cir. 1950) and said:

> "If the courts embark upon the practice of granting or withholding discretionary privileges or procedural advantages because of expressions of attitudes of politi-

[18] See *In re Johnson,* 96 L. Ed. 1377 (1952) where Mr. Justice Douglas refused to issue an order requiring that the prisoner not be moved from the Southern District of California but only upon accepting the Solicitor General's representation that the prisoner would not be removed for eight weeks, noting that there was " . . . no danger at present that petitioner's appellate proceedings will be jeopardized." 96 L. Ed. at 1381.

cal nature, it is not difficult to see that within the limits of its logic the precedent could be carried to extremities to suppress or disadvantage political opposition which I am sure the Department itself would deplore." *Carbo* v. *United States*, 82 S. Ct. 662, 667 (1962).

The government's affidavit facially demonstrates its desire and willingness to stifle petitioner's free speech, to smother dissent, and to jail those who disagree, notwithstanding that they may ultimately be exonerated upon appeal. In the context of our own lives we will have walked a tragic path from 1950 when even Tokyo Rose could go free pending appeal[19] to a sadder day a scant 17 years later when an American citizen may be jailed by military authority for fear of his expressing deviant political views. No victory on a battlefield in Southeast Asia or elsewhere can compensate for a loss of freedom at home. Those who ". . . try to stifle dissent are seeking to destroy one of the very freedoms we're defending" said one American soldier in Viet Nam. *Time*, p. 5, May 26, 1967. That is what this case is all about.

CONCLUSION

On July 8, 1967 Captain Levy was to have been discharged. He is now being held at Fort Jackson, South Carolina prior to being sent to Leavenworth, Kansas for the service of a sentence which may be reversed on appeal. The inherent vice of the Army's present course in denying

[19] *D'Aquino* v. *United States*, 180 F. 2d 271 (Douglas, Circuit Justice, 1950).

him bail is that even though petitioner may ultimately be found innocent of the charges against him he will notwithstanding have served all or a substantial portion of the sentence imposed upon him. His injury will be irreparable. Such a result is both unconstitutional and unconscionable. It is no hallmark of democracy.

Wherefore for the above and foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion and Order of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,581.

HOWARD BRETT LEVY,

Appellant,

APPENDICES

STANLEY R. RESOR, Secretary of the Army; GIVEN PLATZ, Major General, Commanding General, Fort Jackson, South Carolina; E. B. ROBERTS, Brigadier General, Acting Commander, Fort Jackson, South Carolina; JOHN WILSON, Lt. Colonel, Provost Marshal, Fort Jackson, South Carolina; and CHARLES JACKSON, Second Lieutenant, Confinement Officer, Fort Jackson, South Carolina,

Appellees.

Appeal From the United States District Court for the District of South Carolina, at Columbia. J. Robert Martin, Jr., Chief Judge.

(Argued October 4, 1967 Decided October 27, 1967.)

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APPENDIX A

Opinion and Order of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

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No. 11,581.

HOWARD BRETT LEVY,

Appellant,

—versus—

STANLEY R. RESOR, Secretary of the Army; GINES PEREZ, Major General, Commanding General, Fort Jackson, South Carolina; E. B. ROBERTS, Brigadier General, Acting Commander, Fort Jackson, South Carolina; JODE WILSON, Lt. Colonel, Provost Marshal, Fort Jackson, South Carolina; and CHARLES JACKSON, Second Lieutenant, Confinement Officer, Fort Jackson, South Carolina,

Appellees.

Appeal From the United States District Court for the District of South Carolina, at Columbia. J. Robert Martin, Jr., Chief Judge.

(Argued October 4, 1967 Decided October 27, 1967.)

Before:

BRYAN, WINTER and BUTZNER,

Circuit Judges.

CHARLES MORGAN, JR. (Laughlin McDonald, Anthony G. Amsterdam, Alan H. Levine, Eleanor Holmes Norton, Melvin L. Wulf, Charles M. Sanders, Jr., and Walter Jones, on brief) *for Appellant,* and

WISTAR D. STUCKEY, Assistant United States Attorney (Terrell L. Glenn, United States Attorney, on brief) *for Appellees.*

PER CURIAM:

Howard Brett Levy, a captain in the United States Army, on June 2, 1967 at Fort Jackson, South Carolina, was convicted by a general court-martial, of the violation of Articles 90, 134 and 133 of the Uniform Code of Military Justice, 10 USC 890, 934 and 933—the wilful disobedience of a lawful command of his superior officer, the promotion of disloyalty among the troops and the utterance of intemperate, defamatory, provoking and disloyal statements to enlisted personnel. His sentence was dismissal from the service, forfeiture of all pay and allowances and confinement for three years at hard labor.

Following sentence, counsel for Levy advised the court-martial of his intention to appeal and requested his client's release on Commandant's Parole as permitted by the *Manual for Courts-Martial,* paragraph 21(d). That provision reads:

> "Upon notification from a trial counsel of the result of a trial . . . , a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. Such action, depending on the circumstances, may involve the immediate release of the person from any restraint, or the imposition of any necessary restraint pending final action on the case."

The request was denied by the commanding officer at Fort Jackson; and Levy was thereupon, and is now, confined to a room in the hospital there.

He then sought habeas corpus or other appropriate writ in the Federal district court in South Carolina to procure his release on bail pending disposition of his appeal from the court-martial conviction. The Court denied his petition on the ground that the prisoner was not entitled as a matter of right to bail or other release pending appeal, that restraint after conviction was a matter within the discretion of the commanding officer, and that no abuse of it had been shown.

On appeal from the order of the District Court, we are asked to grant the petitioner bail or direct that Court to do so. We decline, for the reasons stated by the District Court and, in a like ruling, by the United States Court of Military Appeals, to whom Levy had also applied for bail, in the case styled Levy v. Stanley R. Resor, Secretary of the Army et al. and designated as Miscellaneous Docket No. 67-9.

In the present case the defendants-appellees have moved this court for an order permitting them to transfer the appellant Levy from the hospital at Fort Jackson to the United States Disciplinary Barracks, Fort Leavenworth, Kansas. As the latter institution, unlike the stockade at

Fort Jackson, has suitable facilities for the custody of officer prisoners, and since the transfer would be in accordance with the customary handling of such prisoners, the motion will be granted, the court finding no prejudice to the appellant in this action.

Orders will be entered accordingly.

APPENDIX B

Opinion of the United States District Court for the Eastern District of South Carolina

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Civil Action No. 67-442

ORDER

HOWARD BRETT LEVY,

Petitioner,

—v.—

STANLEY R. RESOR, Secretary of the Army; GINES PEREZ, Major General, Commanding General, Fort Jackson, South Carolina; E. B. ROBERTS, Brigadier General, Acting Commander, Fort Jackson, South Carolina; JODE WILSON, Lt. Colonel, Provost Marshal, Fort Jackson, South Carolina; and CHARLES JACKSON, Second Lieutenant, Confinement Officer, Fort Jackson, South Carolina,

Respondents.

The Petitioner in this case filed a Petition on June 20, 1967, for a Writ of Habeas Corpus, or in the Alternative, Bail Pending Appeal, or, in the Alternative, Relief in the nature of Mandamus, or, in the Alternative, Such Other

and Further or Different and Appropriate Relief as may be required. This Court, by Order filed June 23, 1967, required the Respondents to show cause within five days of service why a hearing should not be held and the prayer of the Petition be granted. The Respondents filed their Return and Answer on June 28, 1967.

The Petition and Return in this case show the following facts: The Petitioner in this case is a Commissioned Officer holding the rank of Captain in the United States Army stationed at Fort Jackson, South Carolina. On June 2, 1967, the Petitioner was convicted by General Court-Martial of willful disobedience of the order of his superior, making public utterances designed to promote disloyalty or disaffection among the troops, and of conduct unbecoming an officer and a gentleman in violation of Articles 90, 134 and 133, respectively, Uniform Code of Military Justice. The Petitioner was on June 3, 1967, sentenced to be confined at hard labor for three years, to forfeit all pay and allowances, and to be dismissed from the Army. On that date, Brigadier General E. B. Roberts was Acting Commander, Fort Jackson, South Carolina, and as such was on this date of June 3, 1967, the convening authority in the General Court-Martial case of United States vs. Levy, and the Petitioner's Commander. Shortly after adjudgment of the sentence, General Roberts approved the confinement of the Petitioner pending post-trial review and action of the convening authority. The Petitioner is now under restraint at the United States Army Hospital, Fort Jackson, South Carolina.

The sole question to be considered by this Court is whether Petitioner is entitled as a matter of right to bail or release pending the appeal of the Court-Martial conviction and sentence. There is therefore no necessity for an evidentiary hearing, the question being one to be decided by this Court as a matter of law.

Assuming, without deciding, that this question is appropriate in this proceeding, I find no law which grants military personnel the absolute right to bail or release. To the contrary, the Eighth Amendment is not applicable to military personnel, *U. S.* vs. *Vissering,* 184 F.Supp 529 (1960); 72 Harvard Law Rev. 285 (1958).

Petitioner's contention that the rules pertaining to bail in civil courts should be applied to military tribunals is negated by the express exclusion contained in the statutory provision, in the implementation of which such rules were adopted. The offenses for which bail may be taken are those "other than an offense triable by Court-Martial . . ." *Bail Reform Act of 1966* (80 Stat. 216) 18 U.S.C. 3152(2).

Paragraph 21(d) of the Manual for Courts-Martial (1951) would be controlling as to Petitioner's right to bail pending appeal.

> "Upon notification from a trial counsel of the result of a trial (44e (2)), a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. Such action, depending on the circumstances, may involve the immediate release of the person from any restraint, or the imposition of any necessary restraint pending final action on the case."

This clearly confides the nature of restraint to be imposed upon a person convicted and sentenced by Court-Martial

within the discretion of the Commanding Officer. *United States* v. *Petroff-Tachomakoff* (1955) 5 USCMA 824, 826, 19 CMR 120, 122; *United States* v. *Teague* (1953), 3 USCMA 317, 12 CMR 73, 80 and see *United States* v. *Howard* (1953), 2 USCMA 519, 10 CMR 17, 19. The affidavit of General Roberts attached to and as part of the Respondents' Return reflects such exercise of discretion delegated to him as the Commanding Officer of the Petitioner pursuant to Paragraph 21(d) of the Manual for Courts-Martial (1951).

IT IS THEREFORE ORDERED that the relief prayed for by Petitioner be denied and the Petition dismissed.

J. ROBT. MARTIN, JR.
United States District Judge

Charleston, S. C.
July 5, 1967

APPENDIX C

Opinion of the United States Court of Military Appeals in *Levy* v. *Resor*

(17 U. S. C. M. A. 135, 37 C. M. R. 399)

Miscellaneous Docket No. 67-9

UNITED STATES COURT OF MILITARY APPEALS

HOWARD BRETT LEVY, Captain, U. S. Army,

Petitioner,

—v.—

STANLEY R. RESOR, Secretary of the Army; GINES PEREZ, Major General, Commanding General, Fort Jackson, South Carolina; E. B. ROBERTS, Brigadier General, Acting Commander, Fort Jackson, South Carolina; JODE WILSON, Lieutenant Colonel, Provost Marshal, Fort Jackson, South Carolina; CHARLES JACKSON, Second Lieutenant, Confinement Officer, Fort Jackson, South Carolina,

Respondents.

On Petition for Writ of Habeas Corpus, or, in the alternative, bail pending appeal, or, in the alternative, Relief in the Nature of Mandamus, or, in the alternative, such other further or different and appropriate relief as may be required.

Jul 7 1967

Charles Morgan, Jr., Esquire, argued the cause for Petitioner. With him on the brief were *Laughlin McDonald, Esquire, Anthony G. Amsterdam, Esquire, Alan H. Levine, Esquire, Mrs. Eleanor H. Norton, Melvin L. Wulf, Esquire, Captain Charles M. Sanders, Jr.,* and *Captain Walter Jones.*

Captain L. Dean Moore argued the cause for Respondents. With him on the brief was *Lieutenant Colonel David Rarick.*

Opinion of the Court

PER CURIAM:

Petitioner was arraigned before a general court-martial convened at Fort Jackson, South Carolina, charged with disobedience of an order of a superior officer, promoting disloyalty among the troops, and making intemperate, defamatory, provoking, and disloyal statements to enlisted personnel, in violation of Articles 90, 134, and 133, Uniform Code of Military Justice, 10 USC §§ 890, 934, and 933, respectively. He was convicted as charged and sentenced to be dismissed from the service, total forfeitures, and to confinement at hard labor for three years. Pursuant to the judgment and sentence, the petitioner is being detained in the United States Army Hospital at Fort Jackson, awaiting action by the convening authority under Article 64 of the Code, supra, 10 USC § 864.

On June 20, 1967, counsel for Captain Levy filed with this Court a Petition for Writ of Habeas Corpus, or, in the alternative, bail pending appeal, or, in the alternative, Relief in the Nature of Mandamus, or, in the alternative, such other further or different and appropriate relief as may be required. In its brief, counsel allege that the peti-

tioner's continued confinement pending final disposition of his appeal is unlawful and unconstitutional because it is in violation of (a) Manual for Courts-Martial, United States, 1951, paragraph 21*d;* (b) the Due Process clause of the Fifth Amendment to the Constitution of the United States; (c) the excessive bail provision of the Eighth Amendment; (d) Rule 46(a)(2), Federal Rules of Criminal Procedure; and (e) the First Amendment to the Constitution.

Petitioner seeks the issuance of writs of *habeas corpus* or *mandamus.* In a proper case, this Court has the authority to issue such writs. United States v. Frischholz, 16 USCMA 150, 36 CMR 306. The former would test the legality of petitioner's restraint, while the latter is addressed to the enforcement of that judgment and discretion which a public officer, duty bound in law, has failed to exercise. Since the question involved in both of these writs concerns the granting of bail, or release from confinement without bail, pending appeal, also sought by the petitioner, our decision necessarily will be dictated by the answer to the question whether bail is available to a military prisoner.

In tracing the history of bail in the United States, we quite naturally begin with the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

In Carlson v. Landon, 342 US 524, 545, 96 L ed 547, 563, 72 S Ct 525 (1952), the Supreme Court of the United States observed:

"The bail clause [of the Eighth Amendment] was lifted with slight changes from the English Bill of Rights Act. [1 Wm. & Mary II, ch 2, § 1 (10).] In England that clause has never been thought to accord a right to bail in all cases [Petersdorff, on Bail, 483 et seq.], but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. [1 Annals of Congress 753.] The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. [1 Stat. 91, § 33; Rules of Criminal Procedure, 46 (a).] Indeed, the very language of the Amendment fails to say all arrests must be bailable."

And in Stack v. Boyle, 342 US 1, 96 L ed 3, 6, 72 S Ct 1 (1951), the court said:

"... . From the passage of the Judiciary Act of 1789, 1 Stat 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom *before conviction* permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment *prior to conviction*. See Hudson v. Parker, 156 US 277, 285, 39 L ed 424, 426, 15 S Ct 450 (1895). Unless this right to bail *before trial* is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." [Emphasis supplied.]

It is clear, from the interpretation placed upon it by the Supreme Court, that the excessive bail provision of the Eighth Amendment, taken from the English Bill of Rights, was concerned only with the right to bail *prior to conviction.* That the English Bill of Rights was also so limited is borne out by the following statement from Blackstone in his Commentaries on the Laws of England, Book IV, Chapter 22, Of Commitment and Bail, at page 295:

> "Let us next see, who may *not* be admitted to bail, or, what offences are *not* bailable. And here I shall not consider any one of those cases in which bail is ousted by statute, from prisoners *convicted* of particular offences; for then such imprisonment without bail is part of their sentence and punishment. . . ."

The First Congress, by enacting the Judiciary Act, 1 Stat 73 (1789), established the Judicial Courts of the United States and the rules under which they were to operate. With reference to the granting of bail, the Act provides:

> ". . . And upon all arrests in criminal cases [for any crime or offense against the United States], bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court. . . ." [1 Stat 73, 91.]

The Act is silent with regard to bail after conviction.

The Supreme Court, organized under the Judiciary Act, subsequently adopted specific rules for practice and procedure in courts of the United States. In that connection, the Circuit Court for the Northern District of Florida, in Ex parte Harlan, 180 Fed 119, 135 (ND Fla) (1909), (affirmed 218 US 442, 54 L ed 1101, 31 S Ct 44), stated with reference to bail:

> "Supreme Court rule 34 (29 Sup. Ct. xxi) as to bail, when a writ of habeas corpus has issued and been discharged, leaves the bailing of the prisoner pending appeal entirely within the discretion of the court which issued the writ. *It is needless to say that there is no constitutional right to bail in any case, after conviction.* After all that has been said and written on the subject, the only rule which can be deduced from the authorities is that bail should be granted or denied as best effects exact justice between the government and the defendant according to the character and urgencies of the instant case, determined in the light of the principles of the common law as affected by the enactments of Congress." [Emphasis supplied.]

See also the Annotations in 19 ALR 807 and 77 ALR 1235, "Constitutional right to bail pending appeal from conviction," for additional authority, both State and Federal, in support of the proposition that the right to bail after conviction is not a matter of constitutional right.

By authority of Congress, Act of June 29, 1940, 54 Stat 688, the Supreme Court was given specific authority to prescribe rules of pleading, practice, and procedure in criminal courts of the United States. Rule 46 pertains to bail. As originally enacted, Rule 46(a)(2) of the Federal Rules of Criminal Procedure provided in pertinent part:

> "Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court."

This was substantially a restatement of the previously promulgated Rule VI of the Supreme Court Rules of Practice and Procedure in Criminal Cases.

Rule 46(a)(2) was amended in 1956 and the present rule reads:

> "Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay."

Justice Frankfurter in speaking of the change in the rule observed:

> "Obviously, as the Government recognizes, the amendment has greatly liberalized the basis for admission to bail in the federal courts pending an appeal from conviction. . . .
>
> . . . . .
>
> ". . . I think the Government is right in saying that the granting of bail is called for more readily under the new standard than it was under the old concept of 'substantial question.' It is also right in indicating that the new Rule effectuates a shift from putting the burden on the convicted defendant to establish eligibility for bail, to requiring the Government to persuade the trial judge that the minimum standards for allowing bail have not been met." [Ward v. United States, 1 L ed 2d 25, 76 S Ct 1063 (1956); Annotated at 1 L ed 2d 1564, Right to bail before conviction or upon review thereof, under Federal Criminal Procedure Rule 46(a)(1) and (2).]

It is apparent, therefore, that if a military prisoner is entitled to bail, the burden is on the Government to show why it should not be granted.

In an earlier annotation entitled "Bail pending appeal from conviction," 45 ALR 458, covering Federal cases, the majority of the States, as well as England and Canada, it is stated that:

> "Under the common law bail pending an appeal from a conviction was not a matter of right. Rex v Wilkes (1770) 4 Burr. 2527, 98 Eng. Reprint, 327; Rex v Waddington (1800) 1 East, 143, 102 Eng. Reprint, 56. And see the various American cases cited throughout this annotation for dicta to the same effect.
>
> "But generally in the United States, and even to some extent in England, bail pending an appeal from a conviction seems to be a creature of statute." [*Ibid.*, at page 459.]

Having established that the right to bail pending appeal from conviction is not of constitutional dimensions but statutory only, we must look to the statutory law and the rules of procedure governing the military to determine whether the appellant should prevail in his petition.

At the present time, courts-martial are governed by the provisions of the Uniform Code of Military Justice, 10 USC §§ 801 to 940. As recently as United States v. Gallagher, 15 USCMA 391, 35 CMR 363, we had occasion to trace military law from its inception prior to the adoption of the Constitution to the present, and the same need not be repeated here. Suffice to say that the First Congress specifically provided, "That the said troops shall be governed by the rules and articles of war which have been established by the United States in Congress assembled,

or by such rules and articles of war, as may hereafter by law be established." Act of September 29, 1789, 1 Stat 95, 96. We have not found, nor has any instance been called to our attention, wherein the guarantees of bail, existing in the civilian jurisdictions, have been extended to military personnel, sentenced to confinement pursuant to conviction by courts-martial, either by statute, rule or regulation promulgated by the President, or judicial decision. As we stated in United States v. Hangsleben, 8 USCMA 320, 323, 24 CMR 130, "in the military bail is not available." Cf. United States v. Bayhand, 6 USCMA 762, 21 CMR 84.

Federal courts have also recognized the absence of the right to bail pending appeal from a conviction by courts-martial. In United States v. Vissering, 184 F Supp 529, 530 (ED Va) (1960), that court stated:

> ". . . the Eighth Amendment is not applicable to military personnel, and bail is wholly unknown to the military law and practice. 72 Harv. Law Rev. 266, 284, 285; United States ex rel. Woodard v Deahl, D.C. W.D. Ark., 60 F Supp 666; 29 Temple Law Quarterly, 1, 5; United States v Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956)."

Civilian statutes, on occasion, are not intended to apply to the military. Pertinent to the problem at hand is the Bail Reform Act of 1966, 80 Stat 214, 18 USC § 3146, *et seq.* This Act sets forth the current guidelines to be followed by the Federal courts in determining whether an accused should be released pending appellate review, and specifically excludes courts-martial from its provisions. 18 USC § 3152 (2).

Similar to its grant of authority to the Supreme Court to prescribe rules of practice and procedure in Federal

civilian cases, which have the force of statutory law, the Congress, by Article 36 of the Code, supra, 10 USC § 836, granted to the President the parallel power to make such rules for the military courts. By virtue of this authority, the President prescribed by Executive Order 10214 of February 8, 1951, the "Manual for Courts-Martial, United States, 1951." The rules contained therein are similar to, and in some instances identical with, those of the Supreme Court. See United States v. Smith, 13 USCMA 105, 32 CMR 105. No express provision respecting bail is found therein. However, paragraph 21*d* of the Manual, in essence a parallel provision to Rule 46(a)(2), supra, called to our attention by the appellant, provides:

> "Responsibility for restraint after trial.—Upon notification from a trial counsel of the result of a trial (44*e* (2)), a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. Such action, depending on the circumstances, may involve the immediate release of the person from any restraint, or the imposition of any necessary restraint pending final action on the case."

While it seems more likely that that portion of the paragraph relating to "the immediate release of the person from any restraint" applies to those accused who have been acquitted by judgment of the court (see paragraph 22), we will assume that it also applies to convicted persons awaiting final action. Had the President intended to institute a system of bail for the military, it being within his power to do so, it seems evident that this would have been the logical point at which it would have been provided. Not having done so, we will not speculate as to his reasons therefor.

Congress is apparently aware of this omission for, as noted, it specifically excluded courts-martial from the provisions of the Bail Reform Act. We are informed by Government counsel that this was a considered action. In its brief it states:

> "In 1965, the House of Representatives and the Senate developed parallel bills on bail reform, H.R. 10195 and S. 1357. The Senate bill excluded all military tribunals and the House bill did not. The Attorney General of the United States brought this difference to the attention of the House Judiciary Committee. In 1966, the House accepted the Senate version and the bill was enacted with the express provision for the exclusion of all military tribunals (See Senate Report No. 750, 16 September 1965 and House Report No. 1541, 18 May 1966)."

The absence of a specific provision for bail does not fully answer the question for paragraph 21*d* of the Manual, supra, reposes in the commanding officer a discretion in dealing with a convicted prisoner—he may release him on his own recognizance—similar to that reserved to the civilian courts under Rule 46(a)(2). Each case must be decided on its own merits and only where there is a showing of an abuse of discretion will the judgment be reversed. As noted in United States v. Williams, 253 F 2d 144, 148 (CA 7th Cir) (1958):

> "It is obvious that where there is no showing that the appeal is frivolous or taken for delay, and under the plain language of the Rule that bail *may* be allowed, there are some cases where, under the facts, the court is allowed to exercise some discretion in passing upon such a motion as before us here."

The character and extent of a series of offenses afford a proper basis for the exercise of discretionary power to deny bail under Rule 46(a)(2). United States v. Wilson, 257 F 2d 796 (CA 2d Cir) (1958). In accord, see additional citations in note 49 (Discretion of the court) to Rule 46, 18 U. S. Code Annotated.

In the case at bar the petitioner was placed not in a military stockade, with other convicted prisoners, but in a hospital room on the base, albeit under guard. In its brief, counsel alleged that the petitioner was subjected to harassment by the light in his room being on constantly and by the fact that his guard followed him whenever he left the room to use the toilet facilities. We were told at the time of oral argument, however, that these indignities have now been removed.

Under the facts of this case and in the light of the circumstances of the petitioner's present confinement, we do not find an abuse of discretion on the part of the commanding officer in refusing to release the petitioner from confinement under paragraph 21*d*, supra.

We are also urged by counsel to hold the petitioner's confinement illegal under the due process clause of the Fifth Amendment, "because other officers, except those convicted of heinous crimes, are not confined pending appeal"; and under the First Amendment, "because it has had and will have the effect of deterring others from exercising their constitutionally ordained rights of free expression and association." For the purpose of this petition, we find the arguments on these issues unpersuasive.

Accordingly, the petition for writs of *habeas corpus* or *mandamus* is denied. And, in accord with our comments above, petitioner's request for bail, or release without bail, is also denied.

APPENDIX D

Opinion of the United States District Court for the District of Columbia in *Levy* v. *McNamara*

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 953-67

CAPTAIN HOWARD BRETT LEVY, *et al.*,

Plaintiff,

—v.—

ROBERT S. MCNAMARA, *et al.*,

Defendants.

OPINION AND ORDER

Captain Howard Brett Levy, plaintiff, is a Commissioned Officer in the United States Army. He brings this action on behalf of himself and others similarly situated under Rule 23 of the Federal Rules of Civil Procedure. He requests the convocation of a three-judge court (28 U.S.C. § 2282) from which might issue a preliminary injunction to restrain the defendants from proceeding with a general court-martial scheduled to commence against him on May 10, 1967.

Argument on the issues presented was heard on April 28, 1967.

Captain Levy is charged with violation of Articles 133, 134 and 90 of the Uniform Code of Military Justice (herein-

after called "U.C.M.J."). He challenges the constitutionality of Articles 133 and 134 on grounds of vagueness in violation of the Fifth Amendment. He further asserts that Articles 133 and 134 are being utilized to prosecute or threaten to prosecute him for exercise of rights of free expression guaranteed by the First Amendment of the Constitution. As to the charge under Article 90 of the U.C.M.J., although it deals with refusal to obey lawful orders, it too is challenged in the context of this case on grounds that it will deprive the plaintiff of his right of free expression and association under the First Amendment.

Captain Levy was a medical doctor in civilian life. He was commissioned as an officer in the United States Army Reserves on January 29, 1962 and was assigned to the Medical Corps. He was permitted to defer his active service in order to complete his resident training as a dermatologist and entered active military service on July 9, 1965. His initial and present assignment is Chief of Dermatology at the United States Army Hospital, Fort Jackson, South Carolina, where at times pertinent hereto the United States Army conducted a medical training program for Special Forces Aidmen. On or about October 11, 1966 the plaintiff Levy was directed to establish and operate a particular phase of that training program. He refused to obey that order and his refusal is the basis of the charge against him under Article 90 of the U.C.M.J. (10 U.S.C. § 890).

A second charge alleges that Captain Levy uttered disloyal statements to divers enlisted personnel at Fort Jackson with the design to promote disloyalty and disaffection among the troops. This charge was brought under Article 134 of the U.C.M.J. (10 U.S.C. § 934).

The foregoing charges were preferred against the plaintiff on December 23, 1966 by Captain Levy's Commanding

Officer, Colonel Henry F. Fancy. The charges were forwarded to the Commanding General of the United States Training Center, Fort Jackson, South Carolina, with a recommendation of trial by general court-martial. Thereafter various investigations and preliminary procedures were carried out under Article 32 of the U.C.M.J. (10 U.S.C. § 832). As a result of this investigation three additional charges were brought against Captain Levy. Substantially these three additional charges relate to disloyal and disrespectful statements allegedly made by Captain Levy to various enlisted personnel based upon his views as to the conduct of the war in Vietnam. Two such charges were brought under Article 133 of the U.C.M.J. (10 U.S.C. § 933) ("conduct unbecoming an officer and gentleman") and the third was based on Article 134, supra, general article covering all disorders and conduct deemed prejudicial to the Armed Forces. The particular statutes relevant to these proceedings and charged as being unconstitutional are attached as Appendix A.

On March 3, 1967 the Commanding General of the United States Army Training Center, Fort Jackson, South Carolina issued an order convening the court-martial on the several charges levied against Captain Levy. This court-martial is scheduled to begin May 10, 1967.

The defendants oppose both the motion for a preliminary injunction and convening of a three-judge court as sought by the plaintiff. They assert *inter alia* that a three-judge court is clearly unwarranted since this Court lacks jurisdiction over the subject matter of the action and no substantial constitutional issue is presented.

The initial question before the Court is whether it has jurisdiction of the subject matter.

The Congress has taken great care to define the rights of those subject to military law and to provide a complete system of appellate review within the military system to secure those rights. Within this framework, however, it is acknowledged that courts-martial are not designed to provide the same protection of the rights of the individual as is provided in the civilian courts. Out of necessity, as Congress has recognized, ". . . [T]he military system must emphasize the iron hand of discipline more than it does the even scales of justice." *Reid* v. *Covert,* 354 U.S. 1 (1957).

Historically, Federal courts recognizing the doctrine of separation of powers and exhaustion of remedies doctrines, have treated petitions for injunctions of court-martial proceedings as exceeding the Court's jurisdiction. It has been the reiterated policy that "[T]he courts cannot command or regulate the Army." *Reaves* v. *Ainsworth,* 219 U.S. 296, 306 (1910). As stated in *Burns* v. *Wilson,* 346 U.S. 137 at 140 (1953):

> "Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress."

This policy has been emphasized by the Supreme Court in *Orloff* v. *Willoughby,* 345 U.S. 83 at 93 (1953), a case involving a habeas corpus petition by an Army doctor.

Therein the Court declared:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

Recently, our Court of Appeals in *Luftig* v. *McNamara, et al.*, C.A.D.C. No. 20,129, Feb. 6, 1967, applied the principles cited above. There a lawfully inducted private in the U. S. Army sought to enjoin the Secretary of Defense from sending him to Vietnam. The Court stated:

> "It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing . . . the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive."

It is significant that the plaintiff has not shown any instance of the issuance of an injunction to interfere and prevent the conduct of a court-martial proceeding.

Plaintiff will have ample opportunity to raise his contentions in the manner provided by the U.C.M.J. The fact that the court-martial has neither considered nor had the opportunity to consider the plaintiff's claim precludes the Court from acting to circumvent established procedures. *Wales* v. *Whitney,* 114 U.S. 564 (1885); *Gusik* v. *Schilder,* 340 U.S. 128 (1950); *Beard* v. *Stahr,* 370 U.S. 41 (1962). The exhaustion of remedies doctrine applied to Military tribunals is analogous to that applicable to State court proceedings. In *Gusik* v. *Schilder,* 340 U.S. 128 (1950) the Court said at page 131:

> "If Article 53 had been in force when the habeas corpus proceedings were instituted, the District Court would not have been justified in entertaining the petition unless the remedy afforded by the Article had first been exhausted. An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. This is not only the holding of the Court in a long line of cases [citing cases]; it is the rule which Congress recently wrote into the Judicial Code. 28 U.S.C. § 2254, 28 U.S.C.A. § 2254."

While these cases do not deal specifically with application for convening a three-judge court, the principles enunciated do speak loudly for the proposition that this Court has no jurisdiction, by way of a three-judge court or otherwise, to interfere with the operation of the military.

The plaintiff seeks to avoid the force of these precedents by relying on *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965) and as applied by our own Court of Appeals in *Reed*

Enterprises v. *Corcoran*, 354 F.2d 519 (D.C. Cir. 1965). These decisions have no force on the subject matter before the Court in the instant case. In both *Dombrowski* and *Reed* there was never any question that the Court possessed jurisdiction over the subject matter of the actions. There the sole question was whether the case presented a substantial constitutional question, whether injunctive relief was necessary, and whether there was a case or controversy.

This opinion constitutes the findings of fact and conclusions of law of the Court.

In the light of such findings and conclusions, it is this 3rd day of May, 1967,

ORDERED that the petition for a preliminary injunction and convening of a three-judge court is denied.

H. F. CORCORAN
Judge

APPENDIX A

Statutes Involved

Article 90, U.C.M.J., 10 U.S.C. 890, provides:

> § 890. Art. 90. Assaulting or willfully disobeying superior commissioned officer.
>
> Any person subject to this chapter who—
>
> (1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or
>
> (2) willfully disobeys a lawful command of his superior commissioned officer;
>
> shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct. . . .

Article 133, U.C.M.J., 10 U.S.C. 933, provides:

> § 933. Art. 133. Conduct unbecoming an officer and a gentleman.
>
> Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct. . . .

Article 134, U.C.M.J., 10 U.S.C. 934, provides:

> § 934. Art. 134. General article.
>
> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good

order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. . . .

ORDER LIST

MONDAY, MAY 22, 1967

ORDERS IN PENDING CASES

No. ..... HOWARD BRETT LEVY v. CORCORAN

The application for a stay presented to Mr. Chief Justice Warren, and by him referred to the Court, is denied.

..... LURLEEN BURNS WALLACE v. LEE ET AL.

The application for a stay presented to Mr. Justice Black, and by him referred to the Court, is denied.

895 KATZ v. UNITED STATES

The motion of the petitioner for leave to proceed further herein *in forma pauperis* is granted.

CERTIORARI GRANTED

1218 INTERN'L LONGSHOREMEN'S ASS'N, LOCAL 1291 v. PHILA. MARINE TRADE ASS'N

The petition for a writ of certiorari is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 892.

CERTIORARI DENIED

1122 BROWN v. UNITED STATES

1124 BISSELL v. MCELLIGOTT

1130 NOREN v. MCCARTHY

1150) GOODMAN v. UNITED STATES
1151) COHEN v. UNITED STATES
1152) COUGHLIN v. UNITED STATES

APPENDIX E

Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Levy* v. *Corcoran*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,972—September Term, 1966

Civil 953-67

CAPTAIN HOWARD BRETT LEVY, for himself and for all others similarly situated,

Petitioner,

v.

HONORABLE HOWARD F. CORCORAN, United States District Judge,

Respondent.

Before:

BAZELON, *Chief Judge;* and
TAMM and LEVENTHAL, *Circuit Judges.*

ORDER

This cause came on for hearing on petitioner's petition for writ of mandamus and application for a stay and said petition and application were argued by counsel.

Upon consideration whereof, it is

ORDERED by the court that petftioner's aforesaid petition for writ of mandamus and application for a stay are denied.

Per Curiam.

Chief Judge Bazelon dissents from the foregoing order for the reasons stated in his dissenting opinion filed herewith.

TAMM, *Circuit Judge.* I join in denying the application for the stay and the petition for writ of mandamus. I am of the view that this case is not properly before this court at the present time. I am of the opinion that the record discloses that our present petitioner has an adequate remedy at law. It is my view that he cannot at this time show imminent, irreparable injury. In the event of his conviction by a court martial, which at this time is problematical, there is then available to him, through court martial proceedings, review of those proceedings as specifically provided by law, including an ultimate appeal to the United States Court of Military Appeals, which is in itself a court entirely composed of civilians and which court within the last week has ruled that the principles of the Supreme Court's holding in the *Miranda* case are applicable to court martial proceedings. *United States* v. *Tempia,* 35 L. W. 2625 (April 25, 1967).

In addition, there is available to this petitioner, in due course and if he is convicted, the right of appeal to the civil courts through habeas corpus or other appropriate proceedings.

Against this background, I feel that at this time this court is without any jurisdiction in this matter.

LEVENTHAL, *Circuit Judge*: The refusal of the District Judge to take steps to convene a three-judge court seems to me sound for want of equity jurisdiction to restrain de-

fendants from proceeding with a general court-martial schedule to commence May 10, 1967.

The lack of equity jurisdiction to issue an injunction seems to me to inhere in the relationship of the civil courts and military tribunals, a relationship which looks to habeas corpus or kindred remedies as the technique by which the civil courts exercise such limited intervention as may be proper in cases taken before military tribunals. There may be want of equity jurisdiction for such reasons of governmental relationships even where there is no truly adequate remedy at law.[1] But the conclusion is strengthened by our awareness that petitioner can preserve his constitutional defenses before the general court-martial, and in due course can present them to the Court of Military Appeals. That court has indicated its readiness to apply to men in the military service the protection of pertinent Supreme Court decisions based on constitutional grounds.[2]

These considerations do not wholly answer petitioner's contention that the ability of the military to use the broad provisions of articles 133 and 134 of the Uniform Code of Military Justice (10 U.S.C. §§ 933, 934) to punish expressions of views within the continental United States forebodes such a "chilling effect" on speech that is protected by the Constitution as to call for the application of *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

The argument is not without logic. Where it breaks down, it seems to me, is where it runs into a judicial tradition which for more than 150 years has resisted all efforts to issue mandates intended to obviate exposure to court-

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[1] *Smith* v. *Katzenbach*, 122 U. S. App. D. C. 113, 351 F. 2d 810 (1965).

[2] *United States* v. *Tempia*, April 25, 1967.

martials or anticipate the results of proceedings before military tribunals.[3]

It is not necessary to consider now whether this pattern of decisions is absolutely inviolate. It is formidable enough to obviate injunctive relief based on an expansion of the implications of *Dombrowski.* Notwithstanding the language of *Dombrowski,* some individuals and groups will be denied injunctions and relegated to protecting their First Amendment freedoms by way of defense in other proceedings.[4] Furthermore, I cannot accept petitioner's argument that a court should be as ready to enjoin the proceeding of a military tribunal as a Federal court to enjoin a state court proceeding.

Freedoms of speech and expression stand on the highest constitutional ground. And the fact of war does not obliterate freedom to dissent from the war. It may be assumed at least for discussion that although the balance between freedom and discipline is different for men in the military service than for civilians, at least some part of these freedoms is retained when civilians enter the military service. It may further be assumed that if these freedoms are unlawfully disregarded by military tribunals, there may in due course be recourse to the civil courts. But that does not compel this recourse to be by way of injunctive relief.

Whether the foregoing decision was reserved by Congress for three judges, rather than one, is not an easy question. It suffices to say that when the district judge is presented with a motion that is insubstantial insofar as it requests injunctive relief, the law does not contemplate a

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[3] *Wales* v. *Whitney,* 114 U. S. 564 (1885); *Gusik* v. *Schiller,* 340 U. S. 128 (1950); *Beard* v. *Stahr,* 370 U. S. 41 (1962); *Gorko* v. *Commanding Officer,* 314 F. 2d 858 (10th Cir. 1963).

[4] *W. E. B. DuBois Clubs* v. *Katzenbach,* Civil Action 1087-66, April 18, 1967 (Dist. Ct. Dist. of Col., 3-judge).

three-judge court. The district judge can preclude a three-judge court only when it is clear that injunctive relief is not available. I think this is such a case.

BAZELON, *Chief Judge*, dissenting: Petitioner filed his papers at 5:00 p.m. yesterday evening. The Government filed its response at 11:00 a.m. today, and we heard this case at 11:45 a.m. Consequently, there has not been sufficient time for the consideration which the case deserves. However, as presently advised, I am compelled to dissent from the order issued today.

On September 10, 1965, Captain Howard Brett Levy wrote a letter to Sergeant Geoffrey Hancock, Jr. who was then stationed in Viet Nam. The letter strongly, and perhaps intemperately, criticized the foreign policy of the United States. Between February and December, 1966, Captain Levy made similar criticisms to various military personnel at his hospital base in South Carolina. On the basis of these two incidents, Levy's commanding officer charged him with violating Article 133 ("conduct unbecoming an officer and a gentleman") and Article 134 ("all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, . . . ") of the Uniform Code of Military Justice. 10 U.S.C. §§ 933, 934 (1964). Levy was also charged with a violation of Article 90 (wilfully disobeying "a lawful command of his superior commissioned officer").[1]

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[1] Apparently Levy would not give Special Forces Aidmen instruction in dermatology because the instruction would have involved exposing the private parts of his female patients who were suffering from venereal diseases. Levy thought this exposure, without the consent of the patients, violated professional ethics.

10 U.S.C. § 890 (1964). The court martial, at which Levy faces the possibility of a life sentence, begins tomorrow.

Levy claims that Articles 133 and 134 are unconstitutionally vague and that Article 90 is unconstitutional as applied to him. On April 17, 1967, he moved in our District Court to have a three-judge District Court convened to decide the question and to issue an injunction against his pending court martial. On May 3, the District Court denied the motion.

Under *Idlewild Bon Voyage Liquor Corporation* v. *Epstein,* 370 U.S. 713 (1962), a three-judge District Court must hear and determine the case when (1) "the constitutional question raised is substantial" and (2) "the complaint at least formally alleges a basis for equitable relief." 370 U.S. at 715.

Recent cases in this Circuit have interpreted the first requirement to mean that the constitutional claim must be "patently frivolous" before one judge can dispose of it. *Reed Enterprises* v. *Corcoran,* 122 U.S. App. D.C. 387, 390, 354 F.2d 519, 522 (1965); *Hobson* v. *Hansen,* 252 F.Supp. 4, 7 (D.D.C. 1966). Levy argues that Articles 133 and 134 are overly broad, and that their breadth impermissibly impinges upon First Amendment freedoms. A simple reading of the Articles shows that they are quite broad. Indeed, the Manual for Courts-Martial interprets Article 134 to include more than fifty different offenses ranging from abusing public animals to wearing an unauthorized insignia.[2] Levy argues also that Article 90, though not un-

[2] One of the evils of an overly broad statute is that it leaves the definition, and therefore the creation, of crimes to the discretion of minor executive or military officials. The attached appendix (the Manual's suggested forms for drafting charges and specifications under Article 134) shows exactly how broad the discretion is. And the suggested forms do not purport to be exclusive.

constitutional on its face, is being applied as part of a scheme to punish him for exercising his First Amendment rights in the past and prevent him from exercising them in the future.[3] For our present purposes we must take these allegations as true. And if they are true, the constitutionality of Article 90, as applied to Levy, is questionable. *Dombrowski* v. *Pfister*, 380 U.S. 479, 490 (1965).

The second requirement for convening a three-judge court is that the complaint allege a basis for equitable relief. Here Levy says that First Amendment rights will be "chilled" if his prosecution proceeds on the basis of two statutes which are unconstitutional on their face and one which is being applied in order to harass people who exercise their First Amendment rights.[4] This chilling effect, Levy claims, constitutes irreparable injury under *Dombrowski* v. *Pfister*, supra. If Article 90, though constitutional on its face, is being applied to harass Levy, then that part of his case fits within the first ground for the *Dombrowski* decision. 380 U.S. at 490. And if Articles 133 and 134 are unconstitutionally broad then that part of Levy's case fits within the second ground for the *Dombrowski* decision. 390 U.S. at 490-491.

Of course all of this assumes that *Dombrowski* would be read to allow interference with military courts. The *Dombrowski* opinion itself suggests no reason why it should not be read in this way, though there may be other rea-

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[3] He alleges, among other things, that at first his commanding officer decided upon a minor form of non-judicial discipline and that only after he learned of Levy's political opinion was the court martial decided upon.

[4] The problem concerns not only Levy's First Amendment rights but also the First Amendment rights of others, both military personnel and civilians, who may view Levy's court martial as governmental dissatisfaction with dissent.

sons why its scope would be limited. In any event, the applicability of *Dombrowski* to our case has never been decided and is not a frivolous issue.[5]

Since neither the constitutional attack on the Articles nor the claim of irreparable injury is frivolous, this case should be heard and determined by a three-judge District Court. I think this much is abundantly clear. If Levy does have a right to have his case heard and determined by a three-judge District Court, then I think it is equally clear that the right must be made meaningful by a short stay of the court martial proceedings. Otherwise, with the beginning of the court martial tomorrow morning, the three-judge District Court would be left with a moot case.

These questions, whether the statutes are unconstitutional, whether there is irreparable injury, whether *Dombrowski* applies to military courts, are not easy, and they are not made any easier by the extreme time-pressure which confronts us. Moreover, they are not questions for us. They are for a three-judge District Court. I do not intimate any view on the merits. I would grant a short stay simply to preserve the jurisdiction of the three-judge District Court. Once that court is convened it can decide whether to issue a temporary restraining order or a temporary injunction while it considers the merits. Our responsibility is simply to preserve jurisdiction for the court Congress intended to hear this case.

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[5] The cases cited in Footnote 3 of Judge Leventhal's opinion do not deal with statutes which impinge upon First Amendment rights.

Appendix Attached to Order

Article 134

Abusing public animal

118. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully (kick a public horse in the belly) (.....).

Adultery

119. In that ..... (, a married man,) did, (at) (on board) ....., on or about ..... 19...., wrongfully have sexual intercourse with ....., (a married woman) (a woman) not his wife.

Assault:

—Indecent

120. In that ..... did, (at) (on board) ....., on or about ..... 19...., commit an indecent assault upon ..... by ....., with intent to gratify his (lust) (sexual desires).

—Upon a commissioned officer

121. In that ..... did, (at) (on board) ....., on or about ..... 19...., assault ....., a commissioned officer of [the Army of the United States] [....., a friendly foreign power] [the United States (Navy) (Marine Corps) (Air Force) (Coast Guard)], by .....

Note.—That the accused did not know the commissioned officer to be such is a defense to this kind of assault—but not to an included assault in which the official position of the victim is immaterial.

—Upon a warrant, non-commissioned, or petty officer

122. In that ..... did, (at) (on board) ....., on or about ..... 19...., assault ....., a (warrant) (noncommissioned) (petty) officer of [the Army of the United States] [the United States (Navy) (Marine Corps) (Air Force) (Coast Guard)], by .....

NOTE.—That the accused did not know the warrant, etc., officer to be such is a defense to this kind of assault—but not to an included assault in which the official position of the victim is immaterial.

—Upon a person in the execution of police duties

123. In that ..... did, (at) (on board) ....., on or about ..... 19...., assault ....., a person then having and in the execution of (air police) (military police) (shore patrol) (civil law enforcement) duties, by .....

—With intent to commit certain offenses

124. In that ..... did, (at) (on board) ....., on or about ..... 19...., with intent to commit (murder) (voluntary manslaughter) (rape) (robbery) (sodomy) (arson) (burglary) (housebreaking), commit an assault upon ..... by .....

Assault (consummated by a battery) upon a child under the age of 16

125. In that ..... did, (at) (on board) ....., on or about ..... 19...., unlawfully (strike) (.....) ....., a child under the age of sixteen years, (in) (on) the ..... with .....

Bigamy

126. In that ..... did, at ....., on or about ..... 19...., wrongfully and bigamously marry ...., having at the time of his said marriage to .... a lawful wife then living, to wit: .....

Bribery and graft:

—Asking, etc.

127. In that ....., being at the time (a contracting officer for .....) (the personnel officer of ....) (.....), did, (at) (on board) ....., on or about ..... 19...., wrongfully and unlawfully (ask) (accept) (receive) from ....., (a contracting company engaged in .....) (.....), (the sum of $.....) (....., of a value of about $..... .....) (.....), [with intent to have his (decision) (action) influenced with respect to] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by him the said ..... in relation to] an official matter in which the United States was and is interested, to wit: (the purchasing of military supplies from .....) (the transfer of ..... to duty with .....) (.....).

—Promising, etc.

128. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and unlawfully (promise) (offer) (give) to ....., (his commanding officer) (the claims officer of .....) (.....), (the sum of $.....) (....., of a value of about $.....) (.....), [with intent to influence the (decision) (action) of the said ..... with respect

to] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by the said ..... in relation to] an official matter in which the United States was and is interested, to wit: (the granting of leave to .....) (the processing of a claim against the United States in favor of .....) (..... .....).

Check, worthless, making and uttering

129. In that ..... did, (at) (on board) ....., on or about ..... 19...., [with intent to deceive, wrongfully and unlawfully] make and utter to ..... a certain check, in words and figures as follows, to wit: ....., (in payment of a debt in the amount of $..... .....) (for .....) [, he, the said ....., then not intending to have sufficient funds in the ..... bank available to meet payment of said check upon its presentment for payment in due course], and did thereafter wrongfully and dishonorably fail to (place) (maintain) sufficient funds in (the .....) (said) bank for payment of such check upon its presentment for payment.

NOTE.—Both allegations inclosed in brackets should be used in a case in which the accused had given the check in purported payment of a debt not intended to have sufficient funds in the bank available to meet payment upon presentment in due course, but had not thereby obtained any money, personal property, or article of value. Obtaining money, personal property, or an article of value by means of giving a check, without intending to have sufficient funds in the bank available to meet payment upon presentment in due course, may be charged as larceny or wrongful appropriation, as the case may be, in violation of Article 121 (see 200). Without the material in brackets, this specification may be used to denounce merely a wrongful and dishonorable failure to place or maintain sufficient funds in the bank for payment of the check.

Debt, failing to pay

130. In that ....., being indebted to ..... in the sum of $..... for ....., which amount be-

came due and payable (on) (about) (on or about) ...., did, (at) (on board) ....., from ..... 19.... to ..... 19...., wrongfully and dishonorably fail to pay said debt.

Disloyal statements

131. In that ..... did, (at) (on board) ....., on or about ..... 19...., with design to [promote (disloyalty) (disaffection) (disloyalty and disaffection) among (the troops) (the civilian populace) (the troops and the civilian populace)] [.....], publicly utter the following statement, to wit: "....., or words to that effect, which statement was disloyal to the United States.

Disorderly, drunkenness, etc.:

—In command, quarters, etc., or under service discrediting circumstances

132. In that ..... was, (at) (on board) ....., on or about ..... 19...., (drunk) (disorderly) (drunk and disorderly) [in (command) (quarters) (station) (camp) (.....)] [on board ship] [in uniform in a public place, to wit: .....] [.....].

—Drinking liquor with prisoner

133. In that ....., a (sentinel) (.....) in charge of prisoners, did, (at) (on board) ....., on or about ..... 19...., unlawfully drink intoxicating liquor with ....., a prisoner under his charge.

—Drunk, prisoner found

134. In that ....., a prisoner, was, (at) (on board) ....., on or about ..... 19...., found drunk.

—Incapacitating oneself for performance of duties through prior indulgence in intoxicating liquors

135. In that ..... was, (at) (on board) ....., on or about ..... 19...., as a result of previous indulgence in intoxicating liquor, incapacitated for the proper performance of his duties.

Drugs, habit forming, or marihuana:

—Wrongful possession

136. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully have in his possession ..... ounces, more or less, of (a habit forming narcotic drug, to wit: .....) (marihuana).

—Wrongful use

137. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully use (a habit forming narcotic drug, to wit: .....) (marihuana).

False or unauthorized pass, making, etc.

138. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully [and falsely (make) (forge) (alter by .....) (counterfeit) (tamper with by .....)] [sell to .....] [give to .....] [(use) (have in his possession) with intent to (defraud) (deceive)] (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (.....) in words and figures as follows: ....., [he, the said ....., then well knowing the same to be (false) (unauthorized) (.....)].

False swearing

139. In that ..... did, (at) (on board) ....., on or about ..... 19...., (in an affidavit) (in his testimony before a ..... court-martial at the trial of .....) (in .....) wrongfully and unlawfully (make) (subscribe) under lawful (oath) (affirmation) a statement in substance as follows: ....., which statement he did not then believe to be true.

Firearm, discharging:

—Through carelessness

140. In that ..... did, (at) (on board) ....., on or about ..... 19...., through carelessness, discharge a (service rifle) (.....) in the (squadroom) (tent) (barracks) (..... compartment) (.....) of .....

—Willfully, under such circumstances as to endanger life

141. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and willfully discharge a firearm, to wit: ....., (in the mess hall of .....) (.....), under circumstances such as to endanger human life.

Fleeing scene of accident

142. In that ....., being (the driver of) (a passenger in) (the senior officer in) a vehicle at the time of (an accident) (a collision), did, at ....., on or about ..... 19...., wrongfully and unlawfully leave the scene of the (accident) (collision) without [rendering assistance to ..... who had been struck (and injured) by the said vehicle] [making his identity known].

Gambling with subordinate

143. In that (Sergeant) (.....) ..... (, boatswain's mate, first class, U. S. Navy,) (, ...), did, (at) (on board) ....., on or about ..... 19...., gamble with (Private) (.....) ..... (, seaman apprentice, U. S. Navy) (, ...).

Homicide, negligent

144. In that ..... did, (at) (on board) ....., on or about ..... 19...., unlawfully kill ....., [by negligently ..... the said ..... (in) (on) the ..... with a .....] [by driving a (motor vehicle) (.....) against the said ..... in a negligent manner] [.....].

Impersonating an officer, etc.

145. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and unlawfully impersonate an [(officer) (warrant officer) (noncommissioned officer) (petty officer) (agent or superior authority) of the (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)] [an official of the Government of .....] by [publicly wearing the uniform and insignia of rank of a (lieutenant of the .....) (.....)] [showing the credentials of .....] [.....] (with intent to defraud ..... by .....).

Indecent acts with a child

146. In that ..... did, (at) (on board) ....., on or about ..... 19...., [take (immoral) (improper) (indecent) liberties with] [commit a (lewd) (lascivious) act (upon) (with) the body of] ....., a (female) (male)

under sixteen years of age, by [fondling (her) (him) and placing his hands upon (her) (his) leg and private parts] [.....], with intent to (arouse) (appeal to) (gratify) the (lust) (passions) (sexual desires) of the said .... and .....).

Indecent exposure

147. In that ..... did, (at) (on board) ....., on or about ..... 19...., while (at a barracks window) (.....) willfully and wrongfully expose in an indecent manner to public view his .....

Indecent, insulting, or obscene language communicated by a male to a female

148. In that ..... did, (at) (on board) ....., on or about ..... 19...., (orally) (in writing) communicate to ....., a female, certain (indecent) (insulting) (obscene) language, to wit: .....

Indecent, lewd acts with another

149. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully commit an indecent, lewd, and lascivious act with ..... by ....

Loaning money at usurious rate

150. In that ..... (, for and in behalf of one ....,) did, (at) (on board) ....., on or about ..... 19...., loan to ..... $....., under an agreement whereby he, the said ....., was to receive for the use of said money for ..... (months) (days) [interest at the rate of ..... per cent per

(annum) (month)] [the sum of $.....], thereby (demanding) (receiving) (demanding and receiving) an usurious and unconscionable rate of interest for said loan.

Mail, taking, opening, etc.

151. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and unlawfully take (a) certain [letter(s)] [postal card(s)] [package(s)], addressed to ....., [out of the (..... Post Office .....) (orderly room of .....) (unit mail box of .....) (.....)] [from .....] before (it) (they) (was) (were) (delivered) (actually received) (to) (by) the person(s) to whom (it) (they) (was) (were) directed, with design to [obstruct the correspondence] [pry into the (business) (secrets)] of .....

152. In that ..... did, (at) (on board) .....; on or about ..... 19...., [wrongfully and unlawfully (open) (secrete) (destroy)] [steal] (a) certain [letter(s)] [postal card(s)] [package(s)], addressed to ....., which said [letter(s)] [.....] [(was) (were) then [in the (..... Post Office .....) (orderly room of .....) (unit mail box of .....) (custody of .....) (.....)] [on the (bunk of .....) (.....)]] [had previously been committed to ...., (a representative of .....,) an official agency for the transmission of communications,] before said [letter(s)] [.....] (was) (were) (delivered) (actually received) (to) (by) the person(s) to whom (it) (they) (was) (were) directed.

Mails, depositing, etc., obscene matter in

153. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and knowingly

(deposit) (cause to be deposited) in the (United States) (.....) mails, for mailing and delivery to ....., a (letter) (picture) (.....) (containing) (portraying) (suggesting) (.....) certain obscene, lewd, and lascivous matter, to wit: .....

Misprision of felony

154. In that ....., having knowledge that ..... had actually committed a felony (at) (on board) ....., on or about ..... 19...., to wit: (the murder of .....) (.....), did, from about ..... 19.... to about ..... 19...., wrongfully and unlawfully conceal such felony and fail to make the same known to the civil or military authorities.

Nuisance, committing

155. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully (urinate) (defecate) (.....) [on the floor of the squadroom] [on the (deck) (bulkhead) of .....] [.....].

Pandering

156. in that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and unlawfully [(compel) (induce) (entice) (procure)] [attempt to (compel) (induce) (entice) (procure)] ..... to engage in (acts of prostitution) (sexual intercourse for hire and reward) with persons to be directed to (him) (her) by the said .....

157. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and unlawfully [receive valuable consideration, to wit: ....., on

account of arranging for] [arrange for] (.....) (unnamed persons) to engage in (sexual intercourse) (sodomy) with ....., (a prostitute) (.....).

Parole, violation of

158. In that ....., a prisoner on parole, did, (at) (on board) ....., on or about ..... 19...., violate the conditions of his parole by .....

Perjury, statutory

159. In that ....., having taken a lawful oath [in a proceeding before (a board of officers) (a court of inquiry) concerning .....] [upon the making of an affidavit as to .....] [.....], a case in which a law of the United States authorized an oath to be administered, that [he, the said ....., would (testify) (declare) (depose) (certify) truly] [a written (declaration) (deposition) (certificate) subscribed by him was true], did, (at) (on board) ....., on or about ..... 19...., willfully and contrary to such oath (state) (subscribe) a material matter, to wit: ....., which matter he did not then believe to be true.

NOTE.—If the matter falsely stated or subscribed under lawful oath is not material, the offense should be charged as false swearing.

Perjury, subornation of

160. In that ..... did, (at) (on board) ....., on or about ..... 19...., procure ..... to commit perjury by inducing him, the said ....., to take a lawful (oath) (affirmation) in a (trial by ..... court-martial of .....) (trial by a court of competent jurisdiction, to wit: ....., of .....) (deposition for use in a trial by ..... of .....) (.....

.....) that he, the said ....., would (testify) (depose) (.....) truly, and to (testify) (depose) (.....) willfully, corruptly, and contrary to such (oath) (affirmation) in substance that ....., which (testimony) (deposition) (.....) was upon a material matter and which the said ..... and the said ..... did not then believe to be true.

Prisoner, allowing to do unauthorized act

161. In that ....., (a sentinel) (overseer) (.....) in charge of prisoners, did, (at) (on board) ....., on or about ..... 19...., wrongfully allow ....., a prisoner under his charge, to [(go to) (enter) (go to and enter) an unauthorized place, to wit: .....] [(hold unauthorized conversation with .....) (loiter) (neglect his task by .....) (obtain intoxicating liquor) (.....)].

Public record, concealing, mutilating, etc.

162. In that ..... did, (at) (on board) ....., on or about ..... 19...., willfully and unlawfully [(conceal) (remove) (mutilate) (obliterate) (destroy)] [appropriate with intent to (conceal) (remove) (mutilate) (obliterate) (destroy)] a public record, to wit: [the (descriptive list) (rough deck log) (quartermaster's note book) of .....] [.....].

Quarantine, medical, breaking

163. In that ....., having been duly placed in medical quarantine (in the isolation ward, ... Hospital) (.....), did (at) (on board) ....., on or about ..... 19...., break said medical quarantine.

Refusing, wrongfully, to testify

164. In that ....., being in the presence of a [(general) (special) court-martial] [duly appointed board of officers] [.....] of the United States, of which ..... was (law officer) (president) (.....), (and having been directed by the said ..... to qualify as a witness) (and having qualified as a witness and having been directed by the said ..... to answer the following quuestions put to him as a witness, "....."), did, (at) (on board) ....., on or about ..... 19...., wrongfully refuse (to qualify as a witness) (to answer said questions).

Restriction, breaking

165. In that ....., having been duly restricted to the limits of ....., did, (at) (on board) ....., on or about ..... 19...., break said restriction.

Sentinel, lookout, offenses against and by

166. In that ..... did, (at) (on board) ....., on or about ..... 19...., [(attempt) (threaten) to] (unlawfully strike) (assault) ....., a (sentinel) (lookout) in the execution of his duty, [(in) (on) the .....] with (a) (his) ..... .

167. In that ....., (a prisoner), did, (at) (on board) ....., on or about ..... 19...., wrongfully [use the following (threatening) (insulting) (threatening and insulting) language] [behave in an (insubordinate) (disrespectful) (insubordinate and disrespectful) manner] toward ....., a (sentinel) (lookout) in the execution of his duty, ["....," or words to that effect] [by .....].

168. In that ....., while posted as a (sentinel) (lookout), did, (at) (on board) ....., on or about ..... 19...., (loiter) (wrongfully sit down) on his post.

Stolen property, knowingly receiving

169. In that ..... did, (at) (on board) ....., on or about ..... 19...., unlawfully (receive) (buy) (conceal) ....., of a value of about $....., the property of ....., which property, as he, the said ....., then well knew, had been stolen.

Straggling

170. In that ..... did, at ....., on or about ..... 19...., while accompanying his organization on (a practice march) (maneuvers) (.....), without just cause, straggle.

Threat, communicating

171. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully communicate to ..... a threat to (injure ..... by .....) (accuse ..... of having committed the offense of .....) (.....).

Unclean accouterment, arms, etc.

172. In that ..... was, (at) (on board) ....., on or about ..... 19...., found with an unclean (rifle) (uniform) (.....), he being at fault in failing to maintain such property in a clean condition.

Uniform, unclean, improper, appearing in

173. In that ..... did, on or about ..... 19...., wrongfully appear (at) (on board) ..... (without his .....) (in an unclean .....) (with an unclean .....) (.....).

Unlawful entry

174. In that ..... did, (at) (on board) ....., on or about ..... 19...., unlawfully enter the (dwelling house) (garage) (warehouse) (tent) (vegetable garden) (orchard) (stateroom) (.....) of .....

Weapon, concealed, carrying

175. In that ..... did, (at) (on board) ....., on or about ..... 19...., unlawfully carry a concealed weapon, to wit: a .....

Wearing unauthorized insignia, etc.

176. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and without authority wear upon his (uniform) (civilian clothing) [the insignia of grade of a (master sergeant of .....) (chief gunner's mate of .....)] [the Combat Infantryman Badge] [the Distinguished Service Cross] [the ribbon representing the Silver Star] [the lapel button representing the Legion of Merit] [.....].

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 860

HOWARD BRETT LEVY, PETITIONER

v.

STANLEY R. RESOR, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) and the opinion of the district court (Pet. App. B) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1967. The petition for a writ of certiorari was filed on November 28, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below properly declined to order petitioner's release pending review of his conviction by general court-martial.

285-892—67

STATEMENT

Petitioner, a captain in the United States Army stationed at Fort Jackson, South Carolina, was convicted by general court-martial of wilful disobedience of the order of a superior, making public utterances designed to promote disloyalty or dis-affection among troops, and conduct unbecoming an officer and gentleman, in violation of Articles 90, 134 and 133 of the Uniform Code of Military Justice (10 U.S.C. 890, 934, 933).[1] On June 3, 1967, he was sentenced to three years' confinement at hard labor, to forefeit all pay and allowances, and to be dismissed from the Army. The convening authority, General Roberts, approved the confinement of petitioner pending post-conviction review. Requests, addressed to the Commanding General of Fort Jackson and the Secretary of the Army, that petitioner be released from custody pending review were denied on June 12 and 15, 1967, respectively. Petitioner's conviction is presently under review by the United States Army Board of Review in Washington, D.C.

On June 20, 1967, petitioner filed habeas corpus petitions in both the United States Court of Military Appeals and the United States District Court for the District of South Carolina, seeking release pending review of his conviction. The Court of Military Appeals, on July 7, 1967, denied relief, holding that

[1] Petitioner had sought the convening of a three-judge district court to enjoin the pending trial, but this relief was denied. See *Levy* v. *Cocoran*, C.A.D.C., May 9, 1967, 36 U.S. Law Week 3204 (Pet. App. E), certiorari denied, November 13, 1967 (No. 576, O.T. 1967).

petitioner as a military prisoner had no absolute right to bail and that the decision to keep him in confinement pending review was a reasonable exercise of the Commanding General's discretion under the military regulations (Pet. App. C).

The district court denied the application for bail on July 5, 1967, holding that petitioner was not entitled to release as a matter of right pending review of his court-martial conviction, that the question of custody pending review was committed to the discretion of the commanding officer, and that no abuse of discretion had been shown (Pet. App. B). The court of appeals affirmed (Pet. App. A).

ARGUMENT

1. Both the district court and the court of appeals concluded that petitioner is not entitled as of right to be released pending review of his court-martial conviction. In an independent proceeding, the Court of Military Appeals reached the same conclusion. *Levy* v. *Resor,* 17 U.S.C.M.A. 135 (Pet. App. 9a–20a). The petition discloses no reason for further review by this Court. Even in non-military cases, bail after conviction is not governed by the Eighth Amendment and is thus not a matter of constitutional right. See, *e.g., Ex Parte Harlan,* 180 Fed. 119, 135 (C.A. 5), affirmed, 218 U.S. 442; *United States* v. *Motlow,* 10 F. 2d 657, 662 (C.A. 7); *Bowman* v. *United States,* 85 S. Ct. 232. It is well settled, moreover, that the Eighth Amendment right to bail is inapplicable and inappropriate to courts-martial. *United States* v. *Vissering,* 184 F. Supp. 529 (E.D.

Va.); *United States* v. *Hangsleben,* 8 U.S.C.M.A. 320; Henderson, *Courts-Martial and the Constitution: The Original Understanding,* 71 Harv. L. Rev. 293, 316; Wiener, *Courts-Martial and the Bill of Rights: The Original Practice,* 72 Harv. L. Rev. 1, 285–286. Nor is a right to bail pending review of a court-martial conviction afforded by any statute or regulation. Indeed, the Bail Reform Act of 1966, 18 U.S.C. 3146, 3152(2), expressly excludes courts-martial from its provisions.

There is no merit in petitioner's contention (Pet. 12–14) that he is entitled to be released because his confinement pending appeal will have a "chilling effect" on free expression. The principal crime of which petitioner was convicted—wilful disobedience of the order of a superior to establish a training program in dermatology for Special Forces aidmen—is unrelated to the exercise of First Amendment rights. Confinement after conviction is the normal consequence of conviction by court-martial, and no reason appears why the customary course should not be followed here. As we advised the Court in October, in response to the petition for a writ of certiorari in *Levy* v. *Corcoran,* No. 576, O.T. 1967, certiorari denied, November 13, 1967, the Army Board of Review is prepared to proceed expeditiously in reviewing petitioner's conviction and has stayed its hand solely in response to petitioner's request for a substantial extension of time within which to make his submission.

2. The authority for determining whether convicted court-martial prisoners should be confined pending appeal is vested, under military regulations, in the prisoner's commanding officer. See paragraph 21(d), Manual for Courts-Martial (rules prescribed by the President pursuant to Executive Order 10214, February 8, 1951), quoted at Pet. 4. General Roberts, petitioner's commanding officer, did not abuse his discretion in determining that petitioner should be confined pending review of his conviction. Following his conviction, petitioner was initially confined in the Post Stockade at Fort Jackson where he was stationed. Shortly thereafter, he was transferred by General Roberts' order to an available room at the Post Hospital and there placed under guard. On June 12, 1967, General Roberts wrote a letter to petitioner's counsel, denying their formal request that petitioner be released on bond pending appeal of his conviction. The General stated (R. I 71):[2]

> In addition to the nature of the restraint imposed upon Captain Levy, I have considered, among other things, the impact upon morale and discipline of military personnel stationed at Fort Jackson and throughout the Armed Services of any removal of all restraint as suggested; my obligation to insure the safety of Captain Levy as long as he remains at Fort Jackson; the fact that under the system of military justice established by the Uniform Code of Military Justice, sentences to confine-

[2] "R." refers to the record of proceedings below, lodged with the Clerk of this Court.

> ment begin when the sentence is adjudged and are uninterrupted by parole or other lifting of the restraint,[3] while under the non-military system of criminal justice a sentence to confinement does not begin until the convicted person is incarcerated; and the very real possibility that Captain Levy's release from restriction would be construed by enlisted personnel as discriminatory since an enlisted man convicted of comparable offenses and under sentences to confinement would not be relieved of all restraint.

Subsequently, General Roberts indicated in an affidavit (submitted by the government as part of its response to the district court's order to show cause) that, in addition to the foregoing factors, he also took account of his "assessment that a high risk of unlawful flight of the accused existed" (R. I 87). General Roberts stated that he based that assessment in part on "[i]nformation received * * * from a confidential source who has furnished reliable information in the past, that Captain Levy had expressed * * * to a close associate: his intention upon conviction to seek bail, and, having been released thereon, to flee the United States to a communist country, seek political asylum therein" and after several years request permission to return to the United States (R. I 87). The General also stated that, in making his decision to keep peti-

[3] Petitioner's service of his sentence of confinement commenced under military law on the date of its imposition and would continue to run if he was released on bail pending appeal, unless a formal suspension of the sentence was ordered by his commander. 10 U.S.C. 857(b).

tioner under restraint pending appeal, he took into account the seriousness of the offenses of which he was convicted, particularly the offense of wilful disobedience of the order of his superior, and the harmful effect upon morale which his release would have (R. I 87–88).

Although petitioner argues (Pet. 11–12) that he should have had a hearing on the veracity of the informant's information, it is clear that there was no necessity for such a proceeding. As the courts below held, the letter and affidavit of General Roberts plainly evidenced a permissible exercise of discretion by petitioner's commanding officer to maintain custody of petitioner pending review of his court-martial conviction.

3. Petitioner's two-year term of service on active duty expired on July 8, 1967, following the decision in the district court. Contrary to petitioner's suggestion, this fact does not entitle him to be treated differenly from other military prisoners. Petitioner, by virtue of his court-martial conviction for crimes committed while on active duty as an Army officer, remains a military prisoner subject to military law as regards his confinement pending appeal. See Article 2(7), Uniform Code of Military Justice, 10 U.S.C. 802(7); *Kahn* v. *Anderson*, 255 U.S. 1; *Mosher* v. *Hunter*, 143 F. 2d 745 (C.A. 10) certiorari denied, 323 U.S. 800; *United States* v. *Nelson*, 14 U.S.C.M.A. 93. Paragraph 11(d) of the Manual for Courts-Martial states the applicable rule:

> Jurisdiction having attached by commencement of action with a view of trial—as by apprehen-

sion, arrest, confinement, or filing of charges—continues for *all purposes* of trial, sentence, and punishment. [Emphasis added.]

4. While this case was pending in the court of appeals, respondents moved in that court for an order permitting them to transfer petitioner to the barracks at Fort Leavenworth, Kansas. It was pointed out that, since the Secretary of the Army was one of the respondents named in the habeas corpus action and was subject to the jurisdiction of the court, the court's jurisdiction would not be affected by the transfer. The reasons for the proposed transfer were set forth in the affidavit of Major General Perez, the Commanding General of Fort Jackson, filed in support of the motion.[4]

The court of appeals (in the same opinion in which it affirmed the denial of the writ of habeas corpus (Pet. App. A)) granted the motion for transfer. The court found that "the transfer would be in accordance with the customary handling" of officer prisoners and that petitioner would not be prejudiced thereby (Pet. App. 4a). An application for a stay of that order was denied by the Chief Justice on December 12, 1967.

There is no occasion for the Court to consider this matter or to order petitioner returned to Fort Jackson from the facility designed to house officer prisoners.

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[4] The normal place for custody of convicted officers is the barracks at Fort Leavenworth which has established facilities for such custody. Fort Jackson has no suitable facilities for the restraint of officer prisoners. Eight men are required per week for guard duty of petitioner on a twenty-four hour basis. The result is loss of manpower and of hospital space which would be needed for medical purposes during the winter months. R. III, 11.

The transfer does not affect the issues in the habeas corpus proceeding. Petitioner makes no showing in support of his general allegation that the transfer will impair his right to counsel on appeal. As in *Levine* v. *Willingham,* 261 F. Supp. 743 (D. Kans.), petitioner here has had ample opportunity to date to consult with counsel regarding his appeal. At this stage of the proceeding there would be no need for continuous personal consultation between petitioner and his attorneys, many of whom, in any event, have their offices at distances far removed from petitioner's former place of confinement.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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